

QUILL CONSTRUCTION SDN BHD

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v.

TAN HOR TENG & ANOR

HIGH COURT MALAYA, KUALA LUMPUR

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JAMES FOONG J

[ORIGINATING SUMMONS NO. S1-24-331-1995]

6 MARCH 2006

CONTRACT: *Tenancy agreement - Breach of covenant - Interference to tenants business - Torts of maintenance and champerty - Inflated damages claimed - Inducement to breach tenancy - Contracting parties*

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The vendor and owner of the said property was Luggage Distributors Sdn Bhd ("LDSB") and the plaintiff ("Quill") was the purchaser of the said property. The defendants were tenants of the said property under a tenancy agreement for a period of two (2) years with an option to renew for another two years. *Vide* a sale and purchase agreement executed between Quill and LDSB, the said property was sold to Quill with vacant possession but subject to the defendants' tenancy which was still subsisting at that time. When the defendants found out about the intended sale of the said property, they wrote to Quill inquiring as to the state of the tenancy and were informed by Quill's solicitors that Quill intended to have vacant possession of the said property upon completion of the sale. The defendants lodged a caveat on the said property which created problems for the completion of the sale between Quill and LDSB. An application to remove the caveat was instituted by LDSB which, although dismissed in the court of first instance, was allowed on appeal. The caveat was removed and the sale was completed with Quill registered as the owner. The Court of Appeal then made a ruling in the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* that it is unlawful for a tenant to place a caveat over a rented property in order to protect a tenancy. Quill then filed an action against the defendants' for damages suffered as a result of the defendants unlawful action in lodging the caveat and obtained a summary judgment order ("SJ Order") before the senior assistant registrar. The defendants appealed against the SJ Order to the judge in chambers which said appeal was dismissed. The defendants then attempted to set aside the SJ Order *vide* encl. 43 which was heard and dismissed for lack of merit in their complaint. In answer to Quill's claim, the defendants filed their defence and

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- A counterclaim against Quill and LDSB which is what is left of the case to be settled now: (a) whether Quill's letter dated 22 December 1993 interfered with the defendants' right to quiet and exclusive possession of the said property and the defendants' business; (b) whether Quill's letter dated 21 July 1995 constituted a breach of covenant of the tenancy agreement for quiet and exclusive possession of the said property and the defendants' business therein; (c) whether Quill's act of refusing to accept unconditionally the defendants' rentals for the renewed tenancy term constituted a breach of the covenant for the quiet and exclusive possession of the said property and the defendants' business; (d) whether the defendants can succeed in a claim for maintenance and champerty; (e) whether there was a conspiracy to damage and drive away the defendants from their legitimate place of business or to inflate the damages claimed by Quill in this action; and (f) whether Quill had induced LDSB to breach the tenancy agreement with the defendants.

Held (dismissing the defendants' counterclaim with costs):

- (1) When interference is in reference to a tenancy agreement, then it must be restricted to interference of the defendants' business on the said property as there is no obligation under a tenancy agreement to ensure non-interference by the landlord of the tenants' business. When Quill's letter of 22 December 1993 was written, Quill was neither the registered owner nor the landlord of the said property and as such there was no contractual relationship between the defendants and Quill. Since there was no contractual relationship between Quill and the defendants, then a claim by the defendants for interference of the defendants' rights under a term of the contract cannot be maintained. (paras 18 & 20)
- (2) By July 1995, the legal relationship between Quill and the defendants had changed since by virtue of the sale and purchase agreement, Quill had become the owner and landlord of the said property and as such was bound by the tenancy agreement. Quill's incorrect assertion and view that the defendants' extended tenancy was not properly exercised does not constitute a breach of covenant for quiet and exclusive enjoyment of the said property under a tenancy. What Quill did was nothing more than assert its rights and beliefs over the extended tenancy term exercised by the defendants and

although it may be incorrect, it is not substantial enough to justify a breach of the covenant of quiet and exclusive possession of the said property and the defendants' business therein. (paras 21, 25 & 26)

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- (3) Aside from printing the words 'without prejudice' and words to the like effect in these documents, there was no follow up action taken by Quill to enforce their rights. The defendants were left alone to enjoy the quiet and exclusive possession of the said property and to conduct their business therein throughout the extended tenancy. This is clear proof that the defendants had enjoyed quiet and peaceful enjoyment of the said property without any interruptions from the landlord. The landlord's belief and assertion of his rights to regain the said property may be wrong but utterance of this belief does not constitute interference of peaceful and quiet enjoyment. (para 27)

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- (4) The torts of maintenance and champerty have, since 1997 in England, ceased to be actionable torts and can only be applied to declare a contract or assignment void against public policy. Except in like situations as described in these two cases, the causes of action for maintenance and champerty are defunct in this country and can no longer support tortious claims and any remnants of this doctrine may perhaps be confined to cases involving a contract which is void because it is contrary to public policy or being illegal in the circumstances as those in the illustrated cases. Since the facts of the instant case are unlike those situations, the defendants' causes of action for maintenance and champerty against Quill and LDSB cannot be maintained. Even if the defendants can sustain such a tortious claim against Quill and LDSB, they must be rejected as Quill had a genuine commercial interest in the application by LDSB to remove the caveat. As regards the accusation of champerty, there is no evidence before this court that Quill had demanded a share in the proceeds of the action for the removal of the defendants' caveat. In fact Quill is suing the defendants in its own right and not through LDSB, thus the facts do not constitute a cause of action for champerty. (paras 30, 33, 34, & 37)

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- A (5) Though the paragraphs in the reply and counterclaim may indicate some sort of common intention to do an act, there was grave doubt that the act in question is unlawful. All that Quill and LDSB did was to question the validity of the defendants' right to exercise the renewal option of the tenancy at a particular time. Quill and LDSB are allowed to plead what they opine is the legal position over the action taken by the defendants in exercising the option to renew the tenancy way ahead of time, and this by itself does not constitute a conspiracy to do an unlawful act for the predominant purpose suggested by the defendants. On the second aspect of the allegation concerning conspiracy by Quill and LDSB to inflate the damage claim, there was no evidence to support the existence of an agreement or concert to effect such move. (paras 41 & 42)
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- D (6) From the facts, there was no act or intention by Quill to induce LDSB to breach the tenancy with the defendants. Quill's letter of 22 December 1993 only speaks of an intention by Quill to take possession of the said property once it becomes the owner and cannot be considered an inducement to LDSB to dishonor its obligations under the tenancy agreement with the defendants. As for the subsequent impugned letters by Quill, they were written when Quill had become the owner of the said property and was dealing with the defendants in their capacity as owners and landlord of the said property and by which time LDSB was no longer in any position to be induced to terminate the tenancy agreement. (para 45).
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Case(s) referred to:

- G *Brownton Ltd v. Edward Moore Inbucon Ltd* [1985] 3 All ER 499 (*refd*)
Greig v. Insole [1978] 3 All ER 449 (*refd*)
Kelang Pembena Kereta-Kereta Sdn Bhd v. Mok Tai Dwan [2000] 2 CLJ 132 CA (*refd*)
Kenny v. Preen [1962] 3 All ER 814 (*refd*)
- H *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 (*refd*)
Lonrho Ltd v. Fayed [1991] 3 All ER 303 (*refd*)
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 1 CLJ 713 CA (*refd*)
- I *Southwark London Borough Council v. Mills* [1999] 4 All ER 449 (*refd*)
Trendtex Trading Corp v. Credit Suisse [1980] QB 629 (*refd*)

Legislation referred to:

Criminal Law Act 1967 [Eng], s. 14(1)

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Other source(s) referred to:

Chitty on Contract, paras 16-050 & 054, vol 1, 29th edn

Clerk & Lindsell on Torts, 17th edn, para 23-76

Halsbury's Laws of England, 4th edn, reissue, vol 9(1), para 850

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For the plaintiff - Ong Chee Kwan (Danny Yap with him); M/s Lee Ong & Kandiah

For the defendants - Balbir Singh; M/s KY Thong & Co

Reported by Sharmini Pillai

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JUDGMENT**James Foong J:****Introduction**

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[1] This is the second portion of the saga commonly known as 'Luggage Distributor's case' (*Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 2 CLJ 713) made famous by the Court of Appeal's ruling that it is unlawful for a tenant to place a caveat over a rented property in order to protect the tenancy.

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[2] Subsequent to the ruling by the Court of Appeal's the plaintiff, Quill Construction Sdn Bhd (whom I shall from now on refer to as 'Quill Construction' to avoid confusion over its role as plaintiff in the original claim and then as 1st defendant in the counterclaim) filed this action against the 1st and 2nd defendants (the tenant) for damages suffered as a result of the defendants' unlawful act in lodging the caveat. Summary judgment was obtained by Quill Construction before the senior assistant registrar (SAR) for a sum of RM222,548.46 with interest and costs. There was an appeal against this decision to the judge-in-chambers but Justice Malik Ishak on 11 April 2003 dismissed this appeal and affirmed the decision of the SAR.

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[3] The defendants' then attempted to set aside the order for summary judgment by way of encl. 43. I heard and dismissed this application on 27 September 2003 for reason that the defendants failed to advance any merit in their complaint.

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A [4] In answer to the Quill Construction's claim, the defendants have filed a defence and counterclaim. The counterclaim is not only against Quill Construction. Luggage Distributors (M) Sdn Bhd (Luggage Distributors), the original landlord of the rented property, is also brought in as a defendant.

B [5] Since the main claim by Quill Construction is disposed of, what is left to be settled in this case is the counterclaim of the defendants.

C **Defendants' Counterclaim**

[6] From the pleadings, the defendants' counterclaim against Quill Construction and Luggage Distributors for:

- (a) General damages.
- D (b) Special damages of RM980,000 made up of the following:
 - (i) having to purchase another property at overvalued price of RM900,000;
 - E (ii) legal fees for the removal of caveat action amounting to RM20,000 and;
 - (iii) legal fee spent on the appeal to the Court of Appeal for removal of caveat action.
- F (c) Punitive damages.
- (d) Interest at 8% per annum from 22 December 1993 until realization.
- G (e) Costs.

[7] These claims are based on the following allegations:

- 1. Quill Construction has by letter dated 22 December 1993 (Quill's letter of 22 December 1993) interfered with the defendants' rights to quiet and exclusive possession of the demised premises and the defendants' business notwithstanding the tenancy agreement (tenancy agreement) between the defendants and Luggage Distributors dated 8 July 1993.

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2. Quill Construction has also interfered with the defendants' right to quiet and exclusive possession of the demised premises and the defendants' business by its letter dated 21 July 1995 (Quill's letter of 21 July 1995) which refuses to recognize the defendants' renewed tenancy term. A
3. Quill Construction then interfered with the defendants' right to quiet and exclusive possession of the demised premises and the defendants' business by refusing to accept, unconditionally, the defendants' rentals for the renewed tenancy period; Quill Construction only accepted such rentals on a 'without prejudice' basis. B
4. Despite having paid the full purchase price for the said property to Luggage Distributors, Quill Construction funded and maintained Luggage Distributors' application to remove the defendants' caveat. C
5. Quill Construction and Luggage Distributors have champertously maintained this action against the defendants. D
6. Quill Construction and Luggage Distributors had also conspired "to damage and drive away" the defendants' from their legitimate place of business or otherwise "to inflate the damages" claimed by Quill Construction in this action. E
7. Quill Construction has induced Luggage Distributors to breach the tenancy agreement. F

Defence

[8] Quill Construction and Luggage Distributors have denied these allegations of the defendants and had filed a joint defence to the counterclaim. G

Facts Of The Case

[9] The initial facts of this case are adequately set out in Court of Appeal judgment on the removal of the defendants' caveat. This was subsequently expanded by Justice Malik Ishak and myself when dealing with Quill's Construction's claim. Nevertheless, to facilitate readers unfamiliar with them, I reproduce what I have previously said in my judgment of 27 September 2003. H

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- A The plaintiff (Quill Construction) was the purchaser of a shop house (the said property). The vendor and owner of the said property was one Ms Luggage Distributors Sdn Bhd (the said owner). The defendants were tenants of the said property under a tenancy agreement (said tenancy agreement) for a period of 2 years with option to renew for another 2 years.
- B In the sale and purchase agreement (said S & P Agreement) between the plaintiff and the said owner, the said property is sold with vacant possession but subject to existing tenancy. When this S & P Agreement was entered, the defendants' tenancy was still subsisting; the term had not expired.
- C When the defendants became aware of the intending purchase by the plaintiff of the said property, the defendants wrote to the plaintiff inquiring the state of the tenancy. Instead of reassuring that the sale is subjected to the tenancy the plaintiffs' solicitor informed the defendants that the plaintiff intends to have vacant possession of the said property upon completion of sale.
- D Over reacting, the defendants lodged a caveat on the said property. This created problems for the completion of the sale since neither the said property could be transferred nor a legal charge could be created over the same for the purpose of securing finances to assist the plaintiff in completing the sale. In short, this jammed up the sale and purchase of the said property between the plaintiff and the said owner.
- E An application to remove the caveat was instituted by the said owner. In the court of first instant the said owner's application was dismissed. On appeal, the said owner was successful. This paved the way for the caveat to be removed and the sale was completed with the plaintiff recorded as the registered owner.
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- G [10] Now to accommodate this counterclaim, I am expanding the facts to include the following:
- H [11] After the defendants received Quill's letter of 22 December 1993, the defendants exercised their option in writing to Luggage Distributors on 4 January 1994 to renew the tenancy for a further period of two years commencing from 1 September 1995 to 31 August 1997. This information was passed on to Quill Construction by Luggage Distributors. There was no response by either Luggage Distributors or Quill Construction. Then the defendants by letter dated 24 January 1994 to Quill Construction threatened Quill Construction with legal action for the tort of inducement to breach the tenancy agreement between the defendants and Luggage Distributors.
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[12] On 6 March 1995, the Court of Appeal handed down its decision on the removal of the caveat. The Court of Appeal made these observations:

Adopting this approach to the document that is now before this court, it is plain that what the respondents had was a tenancy for a period of two years with an option to obtain a further tenancy for a further two years. Since the recital is silent as to the time frame within which the option is to be exercised or the mode in which it is to be exercised, I am of opinion that it may be exercised by giving notice within a reasonable time before the expiry of the first term of two years. As such I hold that the option had been properly exercised within a reasonable time and that therefore the respondents are entitled to a second term of two years on the same terms as those contained in the tenancy agreement except for the option contained in its second recital.

[13] After this decision of the Court of Appeal, and after Quill Construction has become owner of the said property, Quill's letter of 21 July 1995 enquired from the defendants' solicitors whether the defendants wish "to extend the tenancy for a further period of two years at a rental rate to be mutually agreed upon". This letter ends with this statement: "Please be informed that if no response is received on or before the stipulated date and time, our clients shall assume that your clients are not interested to exercise the option and would expect your clients to vacate the demised premises on the expiration of the above agreement". By this time, the initial tenancy period had expired and the renewed term has come into force.

[14] Though the period given in the ultimatum had passed without the defendants responding to it, no action was taken by Quill Construction to evict the defendants from the demised premises nor was there any letter of demand written by Quill Construction to insist on the defendants quitting the premises.

[15] The defendants continued to occupy the demised premises and dutifully paid the monthly rental to Quill Construction when due. Upon receipt of these, Quill Construction acknowledged them on a 'without prejudice' basis. Such situation continued until 31 July 1997 when the defendants peacefully vacated the demised premises on expiry of the extended period of the tenancy.

[16] Sometime in 1995, the defendants purchased a building a few doors away known as No. 30, Jalan Telawi for a sum of RM2.7 million. According to the defendants, this was RM650,000

A above the market price at the material time. The defendants explained that they were forced to buy this property because of Quill's letter of 22 December 1993 and Quills Construction's refusal to recognize the defendants as having exercised their option to renew the tenancy for a further period of two years.

B **Analysis**

[17] Having set out the aforesaid facts, I now proceed to consider each of the defendants' allegations and if necessary to combine some of them into a single category and deal with them as one.

1st Issue: Did Quill Construction By Its Letter Of 22 December 1993 Interfered With The Defendants' Right To Quiet And Exclusive Possession Of The Demised Premises And The Defendants' Business?

D [18] This claim of the defendants may indicate two different types of interferences: (a) interference to quiet and exclusive possession and; (b) interference with the defendants' business. But from the nature of the submissions tendered by the defendants, I gathered that this claim for interference is only confined to interference that resulted in a breach of contract. The contract under consideration is undoubtedly the tenancy agreement. When it is in reference to the tenancy agreement then this claim of interference to the defendants' business must be restricted to interference of the defendants' business in the demised premises. This is only logical since there is no obligation under the tenancy agreement to ensure non-interference by the landlord of the tenant's business. For this reason, I shall consider this accusation of the defendants (as well as the two others relating to similar nature which I shall be dealing later) to read as: 'interference with the defendants' rights to quiet and exclusive possession and the defendants' business operated in the demised premises' rather than in reference to two separate kind of interferences as pointed out by me.

H [19] Both parties in their respective written submissions have relied on the case of *Kenny v. Preen* [1962] 3 All ER 814 to support their respective propositions relating to this issue as well as the two subsequent ones that follow. In *Kenny v. Preen (supra)* the landlord was sued by the tenant for interfering with her quiet and peaceful enjoyment of the demised premises which was protected by the Rent Act of the United Kingdom. The tenant was successful in the court of first instance and was awarded 100

sterling pounds as damages. On appeal, the Court of Appeal allowed the landlord's appeal but only to the extent of reducing damages to 2 sterling pounds.

[20] Though the facts in *Kenny v. Preen* are, to some degree, similar to our present case the cause of action relied there by the tenant was a breach of covenant of a contractual relationship between the landlord and tenant. In our case, when Quill's letter of 22 December 1993 was written, Quill Construction was neither the registered owner of the said property nor a landlord of the demised premises. There was, at that material time, no contractual relationship between the defendants and Quill Construction. The legal status of Quill Construction then was, at best, a beneficial owner of the said property. It has yet to attain the status and rights of a landlord. When there was no contractual relationship between Quill Construction and the defendants then a claim by the defendants for interference of the defendants' rights under a term of the contract cannot be maintained.

Does Quill's Letter Of 21 July 1995 Constitute A Breach Of Covenant Of The Tenancy Agreement For Quiet And Exclusive Possession Of The Demised Premises And The Defendants' Business Therein?

[21] By July 1995, the legal relationship between the defendants and Quill Construction had changed. Quill Construction has become the owner of the said property and the landlord of the demised premises by virtue of the S & P Agreement with Luggage Distributors. This S & P Agreement contains a clause to state that the sale of the said property is subject to the tenancy agreement. Under such circumstances Quill Construction is bound by the terms and conditions of the tenancy agreement.

[22] Clause 5.2 of the tenancy agreement provides:

That the tenants and persons let into possession by them paying the rental hereby reserved and observing and performing the several covenants and stipulations herein contained shall peacefully and quietly hold and enjoy possession of the premises during the terms hereby created without any interruption by the landlords or any person or persons lawfully claiming under or in trust for him.

[23] In *Kenny v. Preen* (*supra*) Lord Pearson LJ has declared that:

the landlord is not allowed to 'annul his own deed' by interfering with the possession which he himself has conferred on the tenant.

A [24] Then he went further to add:

B The learned judge (trial judge) accepted counsel for the tenant's
first contention, that a mere challenge by the landlord to the
tenant's title, a denial by him of her title, would be sufficient to
constitute a breach of the covenant. I am not able to adopt the
C learned judge's view on that point. We are not concerned in this
case with a denial of the tenant's initial title by virtue of the
letting, and I am not considering whether or not that could be a
breach of the covenant. In this case the landlord was asserting
that the tenant's title, her right to possession of the premises,
D although initially valid, had been wholly determined by a notice to
quit. In my judgment a landlord by merely making that assertion,
however wrong he may be, does not commit a breach of
covenant. He is entitled to make that assertion, at any rate if he
believes it to be true, frequently, emphatically and even rudely. He
is entitled also to threaten proceedings in the courts for possession
and damages.

E [25] This seems to be exactly what Quill Construction did,
making, perhaps, an incorrect assertion and holding the view that
defendants' extended tenancy is not properly exercised. But, as
disclosed in *Kenny v. Preen (supra)* these do not constitute a
breach of covenant for quiet and exclusive enjoyment of the
demised property under a tenancy. There must be something more
substantial. On this Lord Hoffman in *Southwark London Borough
Council v. Mills* [1999] 4 All ER 449 elaborates:

F The covenant for quiet enjoyment is therefore a covenant that the
tenant's lawful possession of the land will not be substantially
interfered with by the acts of the lessor or those lawfully claiming
under him. For present purposes, two points about the covenant
should be noticed. First, there must be a substantial interference
G with the tenant's possession. This means his ability to use it in
an ordinary lawful way ... On the other hand, it is a question of
fact and degree whether the tenant's ordinary use of the premises
has been substantially interfered with.

H [26] Going by the facts of our case, I find that what Quill
Construction did was nothing more than asserting its rights and
belief over the extended tenancy term exercised by the defendants.
This view, as I have said, may be incorrect but I do not think it
is substantial enough to justify a breach of the covenant for the
quiet and exclusive possession of the demised premises and
I defendants' business therein.

Were The Acts Of Quill Construction In Refusing To Accept Unconditionally The Defendants' Rentals For The Renewed Tenancy Term Constitute A Breach Of Covenant For Quiet And Exclusive Possession Of The Demised Premises And The Defendants' Business?

[27] For similar reasons stated above, I do not think that the act of Quill Construction by inserting a notation of "without prejudice" in each of the acknowledgment receipts of rental payments from the defendants is sufficient to constitute a breach of covenant of the tenancy agreement for quiet and exclusive possession of the demised premises and the defendants' business. Aside from printing these words 'without prejudice' and those of "without prejudice to our legal position" or "without prejudice to our right to challenge your client's right to the option" in these documents, there was no follow up action taken by Quill Construction to enforce its rights. There was no formal letter issued by Quill Construction demanding the defendants to quit the demised premises nor was there any legal action instituted to evict them on the basis that the defendants had overstayed. There was also no physical or verbal abuse or threats like those in *Kenny v. Preen (supra)* where forceful or unpleasant tactics were applied on the tenant in a deliberate and persistent attempt to drive her out of the demised premises. In our case, the situation is extremely mild, so much so, that it can hardly be considered as interference at all. In fact the defendants were left alone to enjoy the quiet and exclusive possession of the demised premises and to conduct their business therein throughout the extended tenancy term. The very fact that the defendants stayed on to complete the extended term without interference other than these 'without prejudice' notations is proof that the defendants had enjoyed quiet and peaceful enjoyment of the demised premises without any interruptions from the landlord. As declared by Lord Pearson in *Kenny v. Preen*, the landlord's belief and assertion of his rights to regain the demised premises may be wrong but utterance of this belief does not constitute interference of peaceful and quiet enjoyment.

Can The Defendants Succeed In A Claim For Maintenance And Champerty?

[28] The claim by the defendants that Quill Construction had funded and maintained Luggage Distributor's action to remove the defendants' caveat as well as having a share in proceeds of the outcome falls, I believed, under the causes of action in tort known as 'maintenance and champerty'. What are these causes of action?

- A [29] “A person is guilty of ‘maintenance’ if he supports litigation in which he has no legitimate concern without just cause or excuse”, and ‘champerty’ has been defined as “an aggravated form of maintenance and occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit or other
- B contentious proceedings where property is in dispute” – *Chitty on Contract*, paras. 16-050 & 054, vol. 1, 29th edn. The rational behind these torts was to punish mischief directed against wanton and officious intermeddling with disputes of others by someone who has no interest whatsoever and where the assistance he
- C renders to one or the other party is without justification or excuse.
- [30] But I am saddened to note that all counsel in this case have failed to enlighten this court that such torts have, in England, since 1997 ceased to be actionable torts – see s. 14(1) Criminal
- D Law Act 1967 and *Halsbury’s Laws of England*, 4th edn, reissue, vol. 9(1), para. 850. What remain of these is that they could be applied to declare a contract or assignment void against public policy. They are no longer applicable to mount tortious claims. Such use is best illustrated by the facts in two recent cases
- E involving these doctrines: *Trendtex Trading Corp. v. Credit Suisse* [1980] QB 629, CA and *Brownton Ltd v. Edward Moore Inbucon Ltd* [1985] 3 All ER 499.
- [31] In *Trendtex Trading Corp. v. Credit Suisse (supra)* the plaintiff
- F (T) sold cement, payment to be made by confirmed letter of credit. The issuing bank (CBN) failed to honour the letter of credit and T sued for payment. T was successful in the Court of Appeal but leave was given to CBN to appeal to the House of Lords. At this juncture T assigned its right of action against CBN to the
- G defendants, Credit Suisse, to whom T was heavily indebted for financial assistance provided in connection with the cement contract and the litigation arising out of the dishonouring of the letter of credit. The agreement whereby T assigned its right of action to Credit Suisse also provided that Credit Suisse could
- H assign the right of action to a third party which Credit Suisse eventually did. T subsequently considered that it had been duped by the defendants into making the assignment for what turned out to be a gross undervaluation, and sought to have the assignment set aside on the ground that the whole transaction was
- I champertous. The House of Lords considered the assignment in this case to be void.

[32] In *Brownnton Ltd v. Edward Moore Inbucon Ltd (supra)* the plaintiffs sought advice from A on the installation of computer equipment and on the basis of that advice purchased equipment from B. The equipment never worked. The plaintiffs sued A for damages who in turn alleged that the defective operation of the equipment was due to the fault of B, whereupon the plaintiffs joined B as second defendants. A paid a sum of money into court in settlement of its liability towards the plaintiffs and the plaintiffs were willing to accept this as full satisfaction of its claim against both A and B provided it could reach a satisfactory arrangement on the costs of the various parties. When B refused to agree to any arrangement, A assigned to the plaintiffs any cause of action it might have against B arising out of installation of the equipment. B's claim that this assignment was champertously failed. The court found that the plaintiffs had a sufficient commercial interest to justify the assignment.

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[33] Except in like situation as described in these two cases, I find that the causes of action of maintenance and champerty are, like in England, defunct in this country. They can no longer support tortious claims. Any remnants of these doctrines may perhaps be confined to cases involving a contract which is void because it is contrary to public policy or being illegal in the circumstances as those in the illustrated cases. Since the facts of our instant case are unlike those situations as described, these causes of action of maintenance and champerty mounted by the defendants against Quill Construction and Luggage Distributors are not maintainable.

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[34] In any event, if I am wrong in this aspect of the law and the defendants can sustain such tortuous claims they must be rejected on the ground that Quill Construction had a genuine commercial interest in the outcome of the application by Luggage Distributors to remove the caveat. This defence of a genuine commercial interest in the outcome of this action is laid down in *Brownnton Ltd v. Edward Moore Inbucon Ltd (supra)* itself where Lloyd LJ declares:

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(i) Maintenance is justified, *inter alia*, if the maintainer has a genuine commercial interest in the result of the litigation, (ii) There is no difference between the interest required to justify maintenance of an action and the interest required to justify the taking of a share in the proceeds, or the interest required to support an out-and-out assignment. (iii) A bare right to litigate, the assignment of which is still prohibited, is a cause of action, whether in tort

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- A or contrac, in the outcome of which the assignee has no genuine commercial interest, (iv) In judging whether the assignee has a genuine commercial interest for the purpose of (i) to (iii) above, you must look at the transaction as a whole. (v) If an assignee has a genuine commercial interest in enforcing the cause of action it is not fatal that the assignee may make a profit out of the assignment. (vi) It is an open question whether, if the assignee does make a profit, he is answerable to the assignor for the difference.
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- C [35] It is my view that Quill Construction, at the time when Luggage Distributors instituted the application to strike out the defendants' caveat, was already possessed of a beneficial interest in the said property by virtue of the said S & P Agreement. When the completion for the purchase of the said property was jeopardized by the defendants' caveat, not only Luggage Distributors was affected for not being able to receive the balance of the purchase price. Quill Construction too suffered for not being able to secure the purchase. And all these were brought on by the act of the defendants. In such situation, Quill Construction has a genuine commercial interest to ensure that Luggage Distributors' application to remove the defendants' caveat should be successfully mounted and, if need be, to financially assist Luggage Distributors to pursue this cause of action.
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- F [36] It was argued that there was no necessity for Quill Construction to adopt such approach since Luggage Distributors has a contractual obligation to deliver the said property to Quill Construction free from encumbrances after the balance of the purchase price is received from Quill Construction. And, if this is not fulfilled, Quill Construction could have instituted an action for specific performance against Luggage Distributors. But these arguments do not take into account the fact that part of the balance of the purchase price could not be released by the financier of Quill Construction to Luggage Distributors unless the financier is in a position to lodge a legal charge over the said property. This could not be achieved without the defendants' caveat removed. So if the balance sum is not satisfied, Luggage Distributors could have terminated the sale and forfeited the deposit paid by Quill Construction. This would deprive Quill Construction of any remedy under the contract to proceed with the sale. In this chicken and egg situation this argument of the defendants cannot be sustained. The caveat has to be removed
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and Quill Construction had, at the material time, a very genuine commercial interest in Luggage Distributors' application to remove it. For this, the cause of action for maintenance against Quill Construction has no leg to stand on.

[37] As regards to the accusation of champerty (if such a tortious action is still maintainable) I wish to highlight that there is no evidence before this court that Quill Construction has demanded a share in the proceeds of the action for removal of the defendants' caveat. In this action by Quill Construction against the defendants for damages caused by the lodgment of the defendants' caveat, Quill Construction is suing the defendants in its own right and not under or through Luggage Distributors. Therefore the facts here could not constitute a cause of action for champerty where a person maintaining another demands a share of the proceeds of the suit.

Whether There Was A Conspiracy To: (A) Damage And Drive Away The Defendants From Their Legitimate Place Of Business Or (Ii) To Inflate The Damages Claimed By Quill Construction In This Action?

The tort of conspiracy consists of an agreement by two or more to do an unlawful act, or to do a lawful act by unlawful means – see *Clerk & Lindsell on Torts*, 17th ed., para. 23-76. To succeed in this cause of action three essential ingredients must be proved:

- (a) there must be an agreement between two or more persons;
- (b) the agreement must be for the purpose of injuring the plaintiff;
- (c) the act or acts done in execution of that agreement resulted in damage to the plaintiff – see *Lonrho Ltd v. Fayed* [1991] 3 All ER 303.

[39] Since this allegation of conspiracy concerns two separate matters, I shall deal with the claim for conspiracy to damage and drive away the defendants' right to the demised premises first.

[40] Counsel for Quill Construction and Luggage Distributors argued that there is no evidence of an agreement between his clients for the predominant purpose as accused. Luggage Distributors did not write to the defendants to announce that it is refusing to recognise the defendants' tenancy nor took part in any action to damage and drive the defendants out of the demised premises. Against this, the defendants pointed out that paras 4 to 7 of the joint reply and defence to counterclaim filed by Quill

A Construction and Luggage Distributors have challenged the defendants' right to exercise the option to renew the tenancy. This is proof of a conspiracy to do an unlawful act.

B [41] Though these paragraphs in the reply and defence to counterclaim may indicate some sort of common intention to do an act but is the act in question an unlawful act? I have grave doubt over this. All that Quill Construction and Luggage Distributors did was to question the validity of the defendants' right to exercise the option to renew the tenancy at a particular time. They did not deny the defendants' right to exercise the renewal option, only to the time when it could be exercised. I am fully aware that this may go against what the Court of Appeal said in the application to remove the defendants' caveat. But the statement made by the Court of Appeal (appearing in the earlier part of this judgment) is an *obiter dictum*, a 'by the way saying'.
C The issue of whether the option to renew the tenancy was properly exercised by the defendants was not before the Court of Appeal. The pertinent question before that honourable court was whether the defendants' caveat ought to be removed. It is trite
D law that *obiter dictum* is not a binding precedent. When the statement made by the Court of Appeal is *obiter dictum* then, in my opinion, Quill Construction and Luggage Distributors have every right to plead in the manner as they have done in paras 4 to 7 of their joint reply and defence to counterclaim. They are
E allowed to plead what they opine is the legal position over the action taken by the defendants in exercising the option to renew the tenancy way ahead of time. This, by itself does not constitute a conspiracy to do an unlawful act for the predominant purpose suggested by the defendants.
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G [42] On the second aspect of the allegation concerning conspiracy by Quill Construction and Luggage Distributors to inflate the damage claim, I find no evidence to support the existence of an agreement or concert to effect such move. Quill
H Construction has claimed on its own against the defendants for damages in unlawfully lodging the caveat and this court has found that the damages suffered by Quill Construction duly proved. This is a clear indication that damages requested by Quill Construction are not inflated.

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Whether Quill Construction Has Induced Luggage Distributors To Breach The Tenancy Agreement With The Defendants

[43] To succeed in a claim for inducement and procurement of breach of contract five conditions must be satisfied. This is set out in the case of *Greig v. Insole* [1978] 3 All ER 449 at pp. 484-485 which is accepted by our Federal Court in *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor.* [1984] 2 MLJ 105 at p. 108, and repeated by the Court of Appeal case of *Kelang Pembena Kereta-Kereta Sdn Bhd v. Mok Tai Dwan* [2000] 2 CLJ 132. They are as follows:

- (a) There must either be direct or indirect interference, coupled with the use of unlawful means.
- (b) The defendant must be shown to have knowledge of the relevant contract.
- (c) The defendant must be shown to have an intention to interfere.
- (d) The plaintiff must show that he has suffered special damages, that is, more than nominal damages.
- (e) So far as it is necessary, the plaintiff must successfully rebut any defence based on justification which the defendant may put forward.

[44] As reminded by Slade J in *Greig v. Insole (supra)*, the defence of having acted in good faith and without malice or under a mistaken understanding as to his legal rights is no defence to a claim of inducement and procurement of a breach of contract.

[45] From the facts as presented, I cannot detect any act or intention by Quill Construction to induce Luggage Distributors to breach the tenancy with the defendants. Quill's letter of 22 December 1993, only speaks of an intention by Quill Construction to take possession of the demised premises once it becomes the owner. This is a statement made by Quill Construction. It cannot be considered as an inducement to Luggage Distributors to dishonor its obligation under the tenancy agreement with the defendants. In fact, this letter was not even extended to Luggage Distributors. As for the subsequent impugned letters by Quill Construction, they were written when Quill Construction has become owner of the said property and was dealing with the

- A defendants in the capacity of landlord of the demised premises. By then Luggage Distributors was no longer in any position to be induced to terminate the tenancy agreement. On the part played by Quill Construction for the removal of the defendants' caveat it was confined solely to the removal of the defendants' caveat. It
- B had nothing to do with an inducement of Luggage Distributors to breach the tenancy agreement.

Conclusion

- C [46] In conclusion I hold that this counterclaim of the defendants be dismissed with costs.

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